SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1007

WILLIAM H. LANGROISE, as Executor of the Will of James McDonald, Jr.,

Petitioner,

vs.

WILL CUMMINGS, Individually, and WILL CUMMINGS, as Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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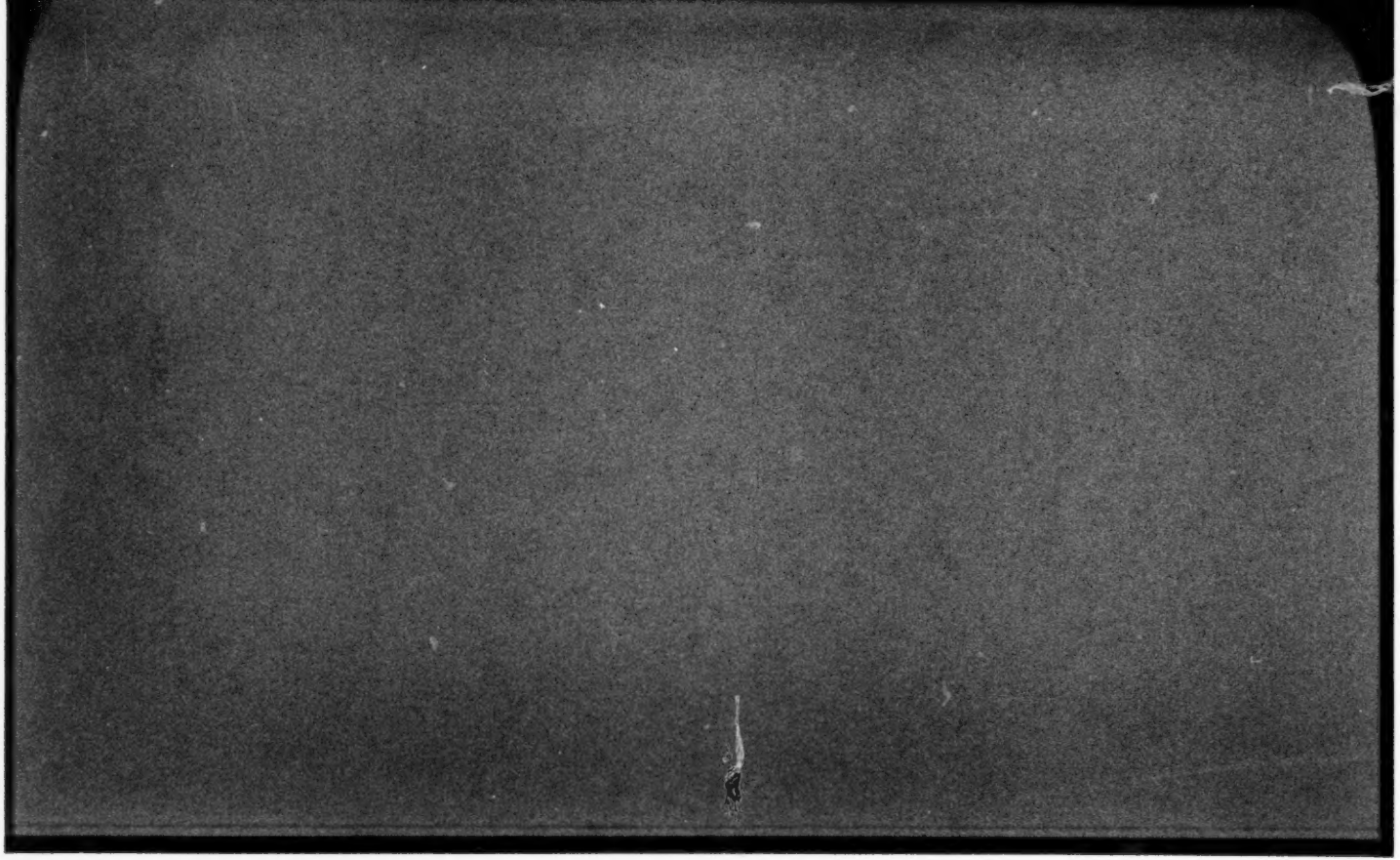

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

William H. Langroise, as Executor of the Will of James McDonald, Jr., by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on November 29, 1941.

OPINIONS BELOW

This case was originally tried in the District Court of the United States for the District of Idaho, Southern Division. The opinion of that Court was rendered December 12, 1940, and is reported in 36 Fed. Supp. 174. (T. 150-169.)

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was entered November 29, 1941, and is reported in 123 Fed. (2d) (Adv. Op.) 969.

The petitioner filed a petition for rehearing of the cause with the Circuit Court of Appeals, which petition was denied January 15, 1942.

JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment of the Circuit Court of Appeals under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U.S.C.A. 347 (a)).

QUESTIONS PRESENTED

I

Whether under the law of the State of Idaho the statute of limitations is tolled by the death of the debtor.

II

Whether a claim against an estate which need not be presented to the Executor because secured by a lien (I.C.A. Sec. 15-611) is not barred by the running of the statute of limitations.

III

Whether I.C.A. Sec. 5-231 applies only to claims against an estate which need not be and are not filed with the Executor or suits for relief of a special nature not involving money demands.

IV

Whether I.C.A. Sec. 15-608 does not require a copy of a note or instrument on which a claim against an estate is founded to accompany the claim.

V

Whether I.C.A. Secs. 15-604 and 15-605 do not require a creditor of an estate to present a verified claim to the Executor before he may bring suit thereon.

VI

Whether respondent may recover $11,250.00 as trustee's compensation in spite of a requirement of the contract on which such compensation is based that it shall decrease in the event of a material reduction in income, which in fact occurred.

VII

Whether respondent is entitled to $10,000.00 as counsel fees in the absence of any evidence of his agreement to pay any attorneys' fees or of the reasonable amount thereof, as required by Idaho law.

VIII

Whether respondent is entitled to recover $2500.00 for legal services rendered him as trustee, in the absence of any such claim in the claim filed by him with the Executor, and in spite of the fact that respondent's complaint seeks no such recovery.

IX

Whether a trustee may recover from the estate of his donor-beneficiary the expenses and obligations incurred by him in the administration of his trust.

X

Whether a creditor may recover in an action against a decedent's estate sums in excess of the amount of his claim filed against said estate, or for items not included in his claim.

XI

Whether in an action against an estate the plaintiff may amend his complaint after the expiration of the three months' period provided by I.C.A. 15-609 to add items not contained in his original complaint or increase the amount sought to be recovered.

STATEMENT OF FACTS

James McDonald, Senior, died January 20, 1915, leaving a large estate (T. 3, 81). His Will and Codicil thereto creating a trust (T. 103-117) were probated in the District of Columbia (T. 3, 81) and subsequently under such Will the Fulton Trust Company of New York and Joseph S. Graydon (successor trustee) were trustees thereof at the time of death of James McDonald, Junior, (hereinafter referred to as McDonald), petitioner's testator. The trust was terminated as to McDonald by decree of court in the District of Columbia in litigation between petitioner executor and such trustees and others in 1938 (T. 4, 81-82, 12-13, 89, 195, 404-406, Exhibits 13, 14). The trust just referred to will be designated as the "Testamentary Trust" and the trustees as "Testamentary Trustees" to prevent confusion with the trust of Cummings, which will be called the "Cummings Trust", hereinafter referred to.

James McDonald, Junior, whose estate is herein involved, was the son of James McDonald, Senior, above mentioned, and a beneficiary of the testamentary trust. He died July 2, 1936, leaving a will of which petitioner Langroise is executor, and the probate of which was, and is being, had in the Probate Court of Ada County, State of Idaho (T. 2-3, 81, 175).

McDonald borrowed from Will Cummings the sum of $50,000.00 on December 17, 1931, at which time McDonald executed and delivered to Cummings his three promissory notes, one for $15,000.00, maturing in one year and subsequently paid (T. 8, 83, 84), one for $15,000.00 maturing in two years (T. 7, 83, 44, 290, Exhibit 43) and one for $20,000.00 maturing in three years (T. 47, 83, 290, Exhibit 43). As part of the same transaction, McDonald executed an assignment as security, referred to as Exhibit A to complaint (Exhibit 5 in evidence), he and Cummings executed Exhibit B to complaint (Exhibit 6 in evidence), and he, Cummings and Leo J. Falk executed Exhibit C to complaint (Exhibit 24 in evidence), (T. 6-7, 83-84, 243-245). Subsequently, the first $15,000.00 note above having been paid, on

September 21, 1933, Cummings loaned McDonald $16,702.70 and the latter executed and delivered his promissory note therefor, maturing in one year, and also executed Exhibit F to complaint (Exhibit 42 in evidence) which brought such note within the terms of Exhibit A (T. 9-10, 84.85, 49, 57-60, 271-272, 289).

Exhibit A (T. 21) above mentioned is an assignment of all McDonald's interest in his father's estate, including all annuities and income therefrom to Cummings to secure specifically the notes evidencing the $50,000.00 loan (Exhibit 43) and later the loan of $16,702.70 (Exhibit 42), appointing Cummings attorney in fact for three years to collect the same, and directing the testamentary trustees to pay it to Cummings. As the testamentary trust was not distributable for some twelve years (1943) the parties contemplated that the annuities and income would be sufficient to pay the notes at maturity, thus discharging the assignment as security and releasing control of his own property back to McDonald, at the end of that period. It was further contemplated, and the testamentary trustee's accounts just previously rendered showed (Exhibits 49, 50, T. 382-383) that there would be an excess of income over the amount required to pay Cummings, who, by Exhibit A had been empowered to collect all of it. (T. 324-382.) Exhibit B (T. 26) was therefore entered into directing disposition of such excess which might be received by Cummings.

By that instrument (Exhibit B) after recital of the notes, of Exhibit A, Cummings, power thereunder to collect, and other indebtedness of McDonald, Cummings became a trustee during the three years of his attorneyship of the trust estate (hereinafter referred to as the "Cummings trust") consisting of:

> "the amount received as *surplus* income *over and above* the amount necessary to pay debts secured by assignments" (T. 28).

in other words, the amount of income which Cummings might receive from the testamentary trustees over and above

the amounts required for payment of his own debt secured by the assignment Exhibit A.

This surplus Cummings as trustee was directed to pay in the following order, (1) $2,000.00 per month to McDonald for support of himself and family, (2) $1,000.00 per month upon the Littleton judgment, (3) the necessary expenses, including taxes, of the Cummings trust, and (4) the balance pro rata to other scheduled, unsecured creditors of McDonald.

Under Exhibit A Cummings was to appoint an agent in Idaho. Hence, Exhibit C (T. 30-32) was executed. It recites the assignment, Exhibit A, and Cummings powers to collect, Exhibit B, the power of attorney limited to three years, that there are existing creditors in Idaho, that in the previous agreement Cummings is to receive $5,000.00 per annum as compensation (no such provision appears in Exhibits A or B, unless the expenses payable under Exhibit B is referred to), and therefor Cummings agrees to employ Falk as Idaho assistant in the trust, and agrees to pay Falk $2,500.00 per annum compensation out of his own pay, and both Falk and Cummings agree:

> "In case there should be a material falling off of the income now estimated to be paid by the trustees to said Cummings, as agent aforesaid, all the parties agree that each shall take a corresponding reduction in the allowances to be paid under this agreement * * * * *" (T. 31).

Thus, Cummings occupied the capacities of a secured creditor of McDonald, of an attorney in fact of McDonald, exercising complete and absolute control over McDonald's income, and a compensated trustee with definite directions for disposition of the excess thereof after payment of himself.

On February 6, 1932, Cummings, as Trustee, borrowed from W. H. Cheney, Trustee, $2,342.80 and as trustee executed his note therefor, due ninety days after date, placing the proceeds in his trustee account (Exhibit 35, T. 56-57, 277-278). Cheney himself never presented any claim thereon

against McDonald or his estate after his death (T. 407). Cummings seeks in this action to recover from McDonald's estate the amount thereof with interest (T. 62) and he was given, individually, judgment therefor (T. 143) notwithstanding absence of any agreement by McDonald personally to pay it.

On August 27, 1934, Cummings, as Trustee, borrowed $5,000.00 from Hamilton National Bank of Chattanooga, Tennessee, executing his trustee note therefor, due in ninety days, and placing the proceeds in his trust account (T. 280-285), Exhibit 38). On September 19, 1935, Cummings, as Trustee, renewed this note (Exhibit 39, T. 312) signing McDonald's name by himself as trustee, but no authority for so signing or renewing appears. On December 19, 1935, he personally purchased it from the Bank (T. 281). However, it, nor a copy of it, did not accompany Cummings' claim presented to the executor (T. 282-285). The Bank presented no claim to the executor (T. 407) and Cummings in this action first sought recovery as owner of the note (T. 63) and thereafter, by amendment, upon the checks with which he purchased it (T. 77). The Bank had not marked the note paid, but endorsed it "Pay to the order of Will Cummings without recourse" (T. 281, Exhibit 39). McDonald had not agreed to be personally liable for this note, nor any other trustee obligations. Cummings, individually, received judgment for the amount of the note with interest (T. 126-129, 144).

Between December 8, 1934, and August 5, 1935, Cummings personally loaned to himself as trustee a total of $950.00 and between October 21, 1935, and June 1, 1936, the further total sum of $975.00, which money went into his trust account and was expended therein (T. 64, 130, 275, 356). McDonald never personally agreed or obligated himself to pay these sums, but recovery thereof was permitted with interest from McDonald's estate (T. 52-53, 130, 132).

As trustee, Cummings employed Carl S. Peterson, an accountant, to keep trust books. This was one of the expenses

of the trust payable, under Exhibit B, prior to distribution to other unsecured creditors. There was no agreement by McDonald to be personally liable for such trustee expense. Cummings did not pay Peterson after July 17, 1934, but claimed, and was allowed to recover against the estate, $587.50 and interest in behalf of Peterson, who had not himself presented any claim to the executor as required by the Probate Law of Idaho (T. 297, 337, 353-355, 359, 362, 408, 135-136).

Shortly prior to Novemebr 3, 1934, Cummings as Trustee employed Wilkes Thrasher, an attorney, to investigate whether there existed a "Protestant Widows' and Old Men's Home" in Cincinnati, Ohio, mentioned in the Will of McDonald, Senior. Thrasher presented a bill to Cummings as Trustee, for $500.00 for services, which he did not pay. McDonald had not agreed personally to pay it. Thrasher did not present any claim to the executor as required by law, nor was there evidence of reasonable value of such service, yet this sum with interest was included in the judgment against petitioner executor (T. 300-303, 328-329, 407-408, 134-5).

Cummings as Trustee claimed an annual salary of $2,500.00 from December 17, 1931, until July 2, 1936 (four years and six months), a total of $11,250.00, with interest thereon from the end of each year. The claim was founded upon Exhibit C, which, however, did not accompany the claim against the estate presented to the executor. Cummings as Trustee did not pay such salary. No agreement by McDonald personally to pay such salary appears, but it was payable only out of the Cummings trust property; that is, the excess of income received over debts secured by assignment, received by Cummings from the testamentary trustees (T. 26-32). As above pointed out, by Exhibit C, Cummings was to take a reduction of salary corresponding to a falling off of income received then (December 17, 1931) estimated to be paid him by the testamentary trustees. There was such reduction. While Cummings was evasive in his testimony

concerning such estimate and intimates none was made, yet Exhibit C flatly states such estimate was in fact made, and Cummings, a financial officer of a large Tennessee County, did estimate that he would be repaid $50,000.00 with interest in three years (Exhibit A), and that there would be a surplus of income received by Cummings sufficient to pay $2,000.00 per month to McDonald, $1,000.00 per month to Littleton, trustee's expense including $5,000.00 per year compensation, with a balance applicable to unsecured scheduled creditors (Exhibit B and C); he had consulted the testamentary trustees in New York, checked to see how much was coming, examined testamentary trustee's reports which showed $146,573.04 income the previous year (T. 232, 242, 324-327, 328, Exhibit 49, T. 382). Cummings' own reports of receipts from the testamentary trustees shows a year by year reduction and a final ending in July, 1935, a year before McDonald's death (T. 52-53, 55). By years, income received by Cummings was reduced, during Cummings' trusteeship and up to the death of McDonald, the period for which compensation is claimed, as follows:

1931-32	$41,699.13
1932-33	34,854.63
1933-34	25,083.29
1934-35	12,576.67
1935-36	None

Yet the court made no reduction in its judgment, allowing the full sum of $2,500.00 per year, or $11,250.00 together with 6% annual interest on accruing amounts (T. 145-146). Aside from the contract, Exhibit C, there was total absence of evidence of reasonable value of his services (T. 307-8).

After the death of McDonald, Cummings made certain advances to his trustee account totaling $388.26 and Peterson claimed additional compensation of $437.50 unpaid by Cummings and stenographic services of $35.25, unpaid, all totaling $861.01. These were not pleaded originally but during trial amendment was allowed. None of the items

were ever presented to the executor for allowance or rejection, either by Cummings or Peterson, and neither the executor nor the Probate Court of Ada County, Idaho, ever had opportunity to examine or pass upon them. No showing that McDonald agreed to pay was shown (T. 348-355, Exhibit 56, T. 78-79). The Court, however, entered judgment against the estate for these items (T. 137, 145).

The foregoing items—the Cheney note (Exhibit 35); the Hamilton Bank note (Exhibit 39); $1,725.00 loaned to Cummings, as Trustee, by Cummings individually, and not paid by the trustee; trustee expense incurred, but not paid by the trustee, to Carl S. Peterson, bookkeeper; trustee expense incurred, but not paid by the trustee, to Thrasher, attorney; trustee expense incurred, but not paid by the trustee, for his own trustee compensation; and trustee expense for loans to himself as trustee, and for employment of Peterson, incurred after the death of McDonald and not paid by the trustee—will be referred to hereafter as the claims of Cummings, as Trustee, or trustee items.

In addition to the trustee items, the action involved certain indebtedness claimed out of loans made by Cummings as an individual directly to McDonald. The notes of December 17, 1931, for $15,000.00 (Exhibit 43) and of September 21, 1933 (Exhibit 42) for $16,702.70, secured by Exhibit A (Exhibit 5) and Exhibit F (Exhibit 42) have already been above described.

About August 7, 1935, the testamentary trustees were served with notice and levy under the Internal Revenue Laws of the United States on account of claimed income taxes of McDonald, and thereupon and thereafter such trustees withheld payments of annuities and income to Cummings. Thereafter, beginning September 7, 1935, and ending June 9, 1936, Cummings loaned various sums to a total of $5,752.00 and $58.46 to McDonald or his wife, and McDonald in November, 1935, executed Exhibit D (Exhibit 4 in evidence) whereby such advances were secured under Exhibit A, the assignment made December 17, 1931 (T. 65-69, 87, 32-33, Exhibit 4, 203-

204, 207-209, 267-269, 272-274, 346, 365). These and the notes above will herein be referred to as claims or items of Cummings individually.

After the death of McDonald the testamentary trustees took the position that his estate was entitled to none of the assets or income of the trust estate; that under clause "N" of the Will of McDonald, Senior, the trust estate would be ultimately distributable directly to the widow (Lula B. McDonald) and sons of McDonald, Junior, (T. 110, 314-325) so that thus the creditors of McDonald, including Cummings, would get nothing. Subsequently, the testamentary trustees brought action in the United States District Court for the District of Columbia seeking an interpretation of the Will, in which action petitioner executor appeared with the result that such Court decreed in June, 1938, that as to the interest of McDonald, Junior, the testamentary trust was terminated and that his portion of the assets should be delivered to Langroise, the petitioner executor, for the McDonald estate. The assets were finally so delivered in October, 1938 (T. 12-13, 89, 211-213, 404, 405).

J. J. Lynch, an attorney at Chattanooga, Tennessee, prepared a claim for Cummings which Lynch transmitted to the executor within the statutory time limit for presentation, and upon which he instructed the executor not to take action until after conference with him. Accordingly, the executor Langroise withheld action until after several conferences with Lynch and after Cummings instituted action against the executor in the District of Columbia upon the same items (which action the Court there dismissed), November 10, 1939, when the claim was rejected. The present action upon the rejected claim was commenced February 6, 1940, and a copy of the claim is attached to the complaint as Exhibit E thereto (T. 11, 16-17, 34-57, 60, 88-89, 314, 318, 384, 386-404, 406-407, 410). The claim purports to be the personal claim of, and verified by, Cummings. However, it sets up the items claimed by Cummings, as Trustee, by Peterson, Cheney, and Thrasher, none of whom as hereinbefore

stated presented or verified any claim against the McDonald estate. Neither the originals or copies of Exhibits A, B, C, D, and F, accompanied the claim, nor were at any time filed with Langroise as executor, as heretofore stated. In 1935, long prior to McDonald's death and the appointment of Langroise as executor, copies of Exhibits A and B had been sent in connection with a matter not involving Cummings' claim to Langroise, then not executor, but acting only as an attorney. The Circuit Court held, as to such latter exhibits, that this was sufficient compliance with the Idaho statute requiring foundation documents to accompany a claim against an estate (T. 185-191, 251-254, 385), and as to Exhibit C (which is the foundation of the claim of compensation for Cummings, as Trustee) held it sufficiently accompanying Cummings' claim although attached to an entirely different claim by a different individual (T. 255, 385). Exhibit F and 39 (Hamilton Bank note) nor a copy, did not accompany the claim, nor were they shown ever to have been in the hands of Langroise as attorney, executor or otherwise (T. 289, 385). The $15,000.00 note of December 17, 1931, being part of Exhibit 43, nor a copy thereof, did not accompany the claim (T. 290-294) a note in different terms having been attached thereto (T. 44-47). The Circuit Court held the Cummings claim sufficient notwithstanding the foregoing (T. 138, 146, 163-4).

Three of the notes evidencing individual Cummings items (T. 44-49) aggregating $51,702.70 of the principal sued for, contained agreements to pay reasonable attorney's fees in case of suit. There was no such agreement with respect to other individual Cummings loans, or trustee items, making up the balance of the accounts sued for. There was no evidence that Cummings agreed to pay attorney's fees, nor any amount agree by him to be paid. Nor was there any evidence of the work required of attorneys in connection with the collection of such notes; on the contrary, the evidence on the point of attorney's labors was with respect to the work involved on all the items sued for, and showed that the major

portion of it was in connection with trustee items, and in connection with the first suit by Cummings against Langroise, executor, brought in a court without jurisdiction and therefore by the Court in the District of Columbia dismissed on motion (Exhibits 15, 16, T. 195-196, 366-374). There was no evidence of what would be reasonable attorney's fees for collection of the notes, nor for the whole case, the estimate being based on a hypothetical question largely reciting labors connected with the Cummings trust and its items, and even then being an estimate not of a "reasonable" fee, but of a fee contingent on a substantial recovery (T. 274-379). However, the Court ignored even this and allowed attorney's fees totalling $10,000.00, of which $7,500.00 was largely for services in the case brought by the testamentary trustees against the executor and legatees to determine the interpretation of the Will of McDonald, Senior, to which Cummings was not a party, and in which he testified no attorney represented him (T. 322), and for services in his District of Columbia suit against the executor which was dismissed for lack of jurisdiction; and the balance of $2,500.00 for attorney's services to Cummings as Trustee, for which McDonald had not obligated himself (T. 165-6, 141-2, 146).

The time limit fixed by the Idaho general statutes of limitations (I.C.A. Secs. 5-214, 5-216, 5-217 and 5-228; note: this reference herein and hereafter is to Idaho Code Annotated, 1932, Official Edition) had expired at the time this action was commenced as to all sums sought to be recovered by respondent, with interest thereon, excepting the principal sum of $4,962.50.

These amounts as to which the time fixed by the statute of limitation had expired are:

Three notes given by McDonald to Cummings	$51,702.70
Loans by Cummings, individually, to McDonald	2,560.46
Cheney note	2,342.80
Hamilton Bank note	5,000.00
Loans by Cummings to Cummings, Trustee	1,375.00

Thrasher's fee	500.00
Peterson's salary	587.50
Cummings' compensation as trustee	10,000.00
Attorney's fee based on notes	10,000.00
	$84,068.46

The opinion of the District Court appears at T. 150-169 (36 Fed. Supp. 174). The Court was of the opinion that the agreements required no priority of payment either of the original $50,000.00 loan by Cummings to McDonald, or of other items of Exhibit B, over pro rating of balance of income, after these were paid, to unsecured creditors (T. 153), that no items were barred by statute of limitations, the provisions of the Idaho Probate Statutes superseding such limitations, and that the time from death to rejection of a claim is not to be computed or taken into account. Further, the Court held that the claims of Cummings as an individual, without accompanying the same with foundation documents as required by law, was sufficient (T. 163-4), and that items incurred by a trustee (Cummings) are chargeable against the creator-beneficiary, personally, without agreement of the latter to pay the same (T. 165). The opinion on attorney's fees has already been epitomized (T. 165-6). The Court further was of the opinion that Cummings individually could include in his claim presented in the estate the claims of Cummings, Trustee, Cheney, Peterson and Thrasher, and could personally recover judgment therefor, without his having paid them and without respect to Idaho laws, and under Rule 8 of Federal Rules of Court Procedure (T. 167).

Following such opinion the District Court made Findings and Conclusions (T. 118-149), and entered judgment on January 4, 1941, in favor of Cummings personally for all items, including individual, trustee, Cheney, Thrasher and Peterson claims, and for $10,000.00 attorney's fees, the whole amounting to $125,491.98, of which $107,901.95 was decreed a lien on all testamentary trustee assets received by the estate, all of which were directed to be turned over to the

Clerk of the Court for foreclosure; the balance of $17,590.03 was ordered paid in course of administration and costs of $158.00 were allowed respondent Cummings. Will Cummings, as trustee, plaintiff, was ignored (T. 169-173). This judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit on November 29, 1941 (123 Fed. (2d) Adv. Op. 969).

SPECIFICATIONS OF ERROR TO BE URGED

I

The court erred in holding that recovery of the sum of $84,068.46 of the principal sum sued for, including attorney's fee, is not barred by the statute of limitations, contrary to the law of the State of Idaho.

II

The court erred in holding that the statute of limitations is tolled by the death of the debtor, contrary to the law of the State of Idaho.

III

The court erred in failing to hold that the statute of limitations did not bar recovery of all items secured by a lien on the trust assets, and in failing to apply the provisions of I.C.A. Sec. 15-611 in substance that no claim secured by a lien need be filed with an executor prior to suit to foreclose.

IV

The court erred in holding that I.C.A. Sec. 5-231, contrary to its language and the decisions of the Idaho Supreme Court, applies only to claims which need not be and are not filed with the executor or to suits for relief of a special nature not involving money demands.

V

The court erred in failing to hold that I.C.A. Sec. 15-608 requires a copy of a note or instrument on which a claim against an estate is founded to accompany the claim, contrary to the express provisions of said Idaho statute.

VI

The court erred in holding that it was not necessary for certain creditors of an estate, to-wit, Cummings, as trustee, Thrasher, Cheney, Hamilton National Bank, and Peterson, to file claims against the estate with the executor, as specifically required by Idaho law.

VII

The court erred in permitting respondent to recover $11,250.00 as compensation for his services as Trustee, contrary to the specific terms of the contract, to the rule against recovery by a trustee of trust expense from a donor-beneficiary, to the Idaho statute of limitations, and to Idaho law requiring presentation of claims.

VIII

The court erred in holding that there is competent evidence that McDonald personally agreed to pay the compensation to the trustee.

IX

The court erred in permitting respondent to recover an allowance of $10,000.00 for counsel fees in the absence of any evidence that respondent agreed to pay any attorneys' fees, and of any evidence of the amount of attorneys' fees which is reasonable, contrary to the requirements of Idaho law.

X

The court erred in holding that respondent may recover $2,500.00 as attorneys' fees for legal services rendered Cummings, as Trustee, notwithstanding that the claim filed by Cummings with the executor made no claim for any such obligation, as required by Idaho probate law, and notwithstanding the complaint filed by respondent in this action neither alleged such indebtedness nor sought such recovery.

XI

The court erred in holding that a trustee (respondent) may have direct recourse against the estate of the donor-

beneficiary (petitioner) for expenses and obligations of the trust.

XII

The court erred in holding that Cummings, individually, was entitled to recover trustee expenses after the death of McDonald when the same were not included in his claim filed with the executor.

XIII

The court erred in holding that Cummings, individually, could recover as Peterson's salary $150.00 more than the amount of such item, as set forth in his claim filed with the executor.

XIV

The court erred in permitting respondent to amend his complaint during trial and after the three months' period allowed by I.C.A. 15-609 had expired to increase the amount sought to be recovered and to add items not contained in the original complaint.

XV

The court erred in entering judgment for respondent in excess of the sum of $3,250.00.

REASONS FOR GRANTING THE WRIT

The decision below involves the determination of a number of questions of the law of the State of Idaho, and petitioner submits that the adjudication on these questions is probably in conflict with the statutes of Idaho and the applicable decisions of the Supreme Court of the State of Idaho.

In deciding these questions of local law the Federal courts are bound by the statutes and decisions of the State of Idaho.

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, (1938).

Huron Holding Co. v. Lincoln M. Operating Co., 312 U. S. 183, 61 Sup. Ct. 513, 85 L. ed. 725, (1941).

Moore v. Ill. Cent. R. Co., 312 U. S. 630, 61 Sup. Ct. 754, 85 L. ed. 1089, (1941).

Yet the Court below ignored the Idaho law and rendered a decision which not only very seriously affects petitioner adversely because of the large amount involved, but also creates a chaotic condition in several extremely important branches of the trust and probate laws of this State.

Because of the numerous questions involved it is thought desirable to arrange them under separate headings and thereunder to indicate briefly to this Court the reasons why the decision of the Circuit Court is erroneous.

The Statute of Limitations Bars Recovery of the Total Amount Sued for With Interest Thereon Except the Principal Sum of $4,962.50

It is conceded that the time limit provided by the Idaho statutes of limitations (I.C.A. 5-214, 5-216, 5-217, 5-228; the Idaho statutes are set out in the appendix) had expired as to the principal amount for which recovery is sought of $84,068.46.

The court below is required to follow and apply the Idaho statutes of limitations.

Moore v. Ill. Cent. R. Co., supra.

In Idaho the statutes of limitations apply in a case in equity as well as one at law.

Steinour v. Oakley State Bank, 49 Ida. 293, 287 Pac. 949, (1930).

However, the Circuit Court permitted recovery of the full amount sued for, together with interest thereon.

The statute of limitations had not run as to any of these items at the time of the death of the debtor McDonald, and the court held that in Idaho the death of the debtor tolls the running of the statute. The rationale of the court is that the Idaho probate statutes of non-claim (I.C.A. 15-601, 15-602, 15-604, 15-607, 15-609 and 15-611) provide a scheme different

from and independent of the general statutes of limitations, and, thus, are a "different limitation" within the meaning of I.C.A. 5-201, which excepts the statutes of limitations "when in special cases a different limitation is prescribed by statute".

This decision of the courts results from a tortured construction of Idaho statutes and a disregard of Idaho decisions. The statute of limitations merely bars the remedy while the statutes of non-claim operate directly to wipe out the debt. They operate independently of each other and one does not supersede or supplant the other; consequently, the statute of limitations continues to run after the death of the debtor (except by statute in special instances not concerned here), and if the time expires before suit is commenced recovery cannot be had. It must be kept in mind that petitioner is sued as the executor of a decedent's estate and he may not waive the bar of the statute.

Dern v. Olsen, 18 Ida. 358, 110 Pac. 164, (1910).

In Gwinn v. Melvin, 9 Ida. 202, 72 Pac. 961, (1903), the Supreme Court held that the statute of limitations is applicable to a creditor of a decedent and he must act to save his claim from the bar of the statute.

Later the Court said in Dern v. Olsen, supra, that where a note matures prior to death the general statute of limitations expiring during administration of the estate bars the action. The Court said:

> "It was the intention of the lawmakers to prohibit the administrator in any manner extending the bar of the statute of limitations or to interrupt its running against the debtor or claim against the estate he represents."

Again, in Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 Pac. 901, (1910), the court reiterates its established rule that the general statute of limitations continues to run after death.

The Circuit Court, in reaching its determination that the running of the statute of limitations ceases upon the death of the debtor, wholly disregards these Idaho decisions, except to mention that they did not stop to analyze the case of Miller v. Lewiston Nat. Bank, supra.

The Idaho statutes of limitations themselves are generally in their scope and contain no intimation that they cease to operate upon the death of the debtor. In addition, there are two provisions of the Idaho Probate Code which force the conclusion that the statute continues to run.

I.C.A. 5-231 provides that if a person against whom an action may be brought die before the statute of limitations has run and the action survives, the action may be commenced after the expiration of the period of the statute and within one year after issuance of letters testamentary. Thus, the legislature has provided for extending the period of the general statute of limitations in a certain specified instance; and the conclusion follows inescapably that the statute of limitations continues to run after death except when so extended by this statute. (This statute does not extend the period of limitations in this case as this action was not commenced within a year after issuance of letters testamentary to Langroise.)

The Idaho Supreme Court considered I.C.A. 5-231 in Miller v. Lewiston Nat. Bank, supra, and said:

> "It is apparent that the provisions of this section were not intended to shorten the time within which an action may be brought, under the general provisions of the statute, but were intended to extend such time in certain cases; that is, where at the time of a party's death there is not one year left of the period of limitations prescribed by the general statutes after the issuing of letters, the claimant shall have at least one year therefrom, and thus to this extent this section extends rather than shortens the period. If, however, at the time of issuing letters more than one year is left of the period of limitations prescribed by the general statute, then

this statute does not shorten that period, *and in such case it has no effect whatever.*" (Italics ours.)

Thus, it is clear that the state court considers the general statute of limitations keeps running after death and bars an action, unless extended by I.C.A. 5-231.

The Circuit Court admitted that this statute conflicted with its position that death tolls the running of the statute of limitations, and consequently stated that it only applies to "claims which need not be and are not filed with the executor or to suits for relief of a special nature, not involving money demands". No such strained limitation can be supported by the language of the act itself. It is general in its terms, applies to all actions which survive, and contains no words of limitation or exclusion. It is apparent on its face that the legislature knew the general statute of limitations continued to run after death, and that the act was necessary to protect creditors whose claims would be barred within a short time after death. Unless such construction is given the statute it is meaningless and the purpose of the legislature is futile.

California has an identical statute in Sec. 353 of the Code of Civil Procedure, and the California courts have held that it applies to money demands which must be presented to the executor.

Barclay v. Blackinton, 127 Cal. 189, 59 Pac. 834, (1899).

In Re Garnett's Estate, 126 Cal. App. 344, 14 Pac. (2d) 572, (1932).

Dodson v. Greuner, 28 Cal. App. (2d) 418, 82 Pac. (2d), (1938).

The strained construction imposed on this statute by the court below is unwarranted. If it is granted its obvious scope it harmonizes with the Idaho Probate Code and with the established Idaho doctrine that the statute of limitations continues to run after death.

The same conclusion is inexorably demanded by I.C.A. 15-738, which provides:

> "* * * No claim against any estate which has been presented and allowed is affected by the statute of limitations pending the proceedings for settlement of the estate. * * *"

So, if a claim is presented and allowed the statute of limitations ceases to run against it, and, applying the familiar rule of statutory construction of expressio unius est exclusio alterius, the general statute of limitations continues to run against all claims not so presented and allowed. This doctrine is Idaho law.

People v. Goldman, 1 Ida. 714, 23 Pac. St. Rep. 714, (1878).

Peck v. State, ... Ida. ...., 120 Pac. (2d) Adv. Op. 820, (1941).

The Circuit Court bases its conclusion that the probate statutes of non-claim provide a different limitation within the meaning of I.C.A. 5-201 or a "statutory prohibition" within the terms of I.C.A. 5-234, and thus death stops the running of the statute of limitations, upon Wormward v. Brown, 50 Ida. 125, 294 Pac. 331, (1930). This case is not in point; it neither discusses nor is concerned with the statute of limitations; it does not attempt to construe the Idaho statutes. It certainly does not hold that death tolls the statute, nor overrule the above cited Idaho cases. At the very most this case states that rejection of a claim by the executor is a condition precedent to suit; and the claimant may readily compel the executor to act. Thus, this case is not a "statutory prohibition" as required by I.C.A. 5-234.

The court below held that respondent has a lien to secure the bulk of his claim. Therefore, by I.C.A. 15-611 it was unnecessary for him to present a claim to the executor. This would bring all the lien items squarely within the Circuit Court's own construction of I.C.A. 5-231, as being a claim which need not be filed with the executor. Thus, by that

Court's very declaration these secured claims are outside of the statutory scheme of the statutes of non-claim which supercede the general statutes of limitations. Therefore, the statute of limitations continued to run as to such items and they were barred at the time this action was commenced.

The Circuit Court, in holding that the statute of limitations ceases to run upon the death of the debtor, has disregarded the contrary local law of the State of Idaho. If this opinion should stand the unfortunate condition is created whereby a creditor of an estate who is able to bring his action in the Federal courts is not affected by the statute of limitations, but the local creditors who have access only to the State courts are barred from recovery if the period of limitation has expired.

The Court Erred in Failing to Apply I.C.C. 15-608, and Require That the Claims Founded Upon Written Instruments Be Accompanied by Copies Thereof

I.C.A. 15-608 provides:

> "If the claim is founded on a bond, bill, note or any other instrument, a copy of such instrument must accompany the claim. * *"

It is admitted that copies of the three agreements entered into in 1931, being Exhibits, attached to the complaint, A, on which respondent bases his right to a lien, B his right to trustee items, and C his right to trustee compensation, were not attached to the claim, nor were they ever presented to nor filed with the executor.

The court below felt, however, that the statute had been substantially complied with because Mr. Langroise had, during the lifetime of McDonald, come into possession of copies of Exhibits A and B as his attorney, and because a copy of Exhibit C was attached to another claim filed by a wholly different person.

The purpose of this statutory requirement is to enable the Executor and the Probate Judge intelligently to pass upon

the claims presented. The Circuit Court so held in its opinion in this case. But here, even if the Executor had access to copies in his attorney's files, the Probate Judge was denied the statutory right to examine these instruments in passing on the claim.

This provision of the statute is mandatory.

Flynn v. Driscoll, 38 Ida. 545, 223 Pac. 528, (1924).

and, therefore, the Court wholly disregarded the Idaho statutes and decisions by holding a claim is properly filed which is not accompanied by copies of instruments on which it is founded.

It Was Erroneous for the Court to Disregard the Mandate of the Idaho Statutes Requiring a Creditor to File a Claim Against the Estate

Cheney, Peterson, Thrasher and Cummings, Trustee, did not file any claim with the Executor of McDonald's estate. Nor was any claim filed for the amount based on the Hamilton Bank note. Cummings included the amounts, due these persons from the Cummings trust only, in his individual claim.

I.C.A. 15-604 provides that any claim not presented within six months is barred, and I.C.A. 15-605 requires every claim to be verified by the claimant or someone in his behalf. It is not contended that these persons filed any claim, nor that any claim was verified by them or someone in their behalf. Consequently, no recovery can be had for these items.

Schneeberger v. Fraser, 36 Ida. 737, 213 Pac. 568, (1923).

The Circuit Court thought that, as these persons were looking primarily to the Cummings trust estate for reimbursement, Cummings could include all their items in his individual claim against McDonald's estate. However, petitioner is at a loss to understand why this would enable the court to sanction failure to comply with the mandatory requirements of Idaho law.

In the claim filed by Cummings, individually, with the Executor he sought payment to him of $437.00 allegedly due Peterson as salary. But in bringing this action he seeks to recover $587.50 for such salary, or $150.00 more than the amount for which the claim was filed. The court, disregarding the requirements of the above mentioned Idaho statutes which do not permit recovery for more than the amount for which the claim was filed, allowed respondent to recover the additional sum of $150.00 without giving any explanation in its opinion for refusing to follow the Idaho law. The same thing is true with regard to the sum of $861.01, being trustee expense after the death of McDonald. No claim for this sum was filed with the Executor; nor did respondent seek it in his original complaint. However, during trial, and after the three months' period allowed by I.C.A. 15-609 had expired, amendment was permitted over objection to include this amount.

It Was Erroneous for the Court to Allow Recovery of $11,250.00 as Trustee's Compensation

Respondent seeks to recover compensation for his services as trustee at the rate of $2,500.00 a year with interest as each accrued. This was allowed in full.

This claim is based on Exhibit C, which states as follows:

> "In case there should be a material falling off of the income now estimated to be paid by the trustees to said Cummings, as agent as aforesaid, all the parties agree that each shall take a corresponding reduction in the allowances to be paid under this agreement and the agreements herein referred to."

The reports of the testamentary trustees, Exhibits 49 and 50 (T. 350-384), for the year prior to December, 1931, when Exhibit C was executed, showed an income payable to Cummings had the agreements then been in effect of more than $130,000.00 per year.

Cummings' trust report of income paid to him, Exhibit 28,

page 2, (T. 52-53) shows a constant material reduction. Based on the above estimate and upon such income paid the reduction of salary as agreed to in Exhibit C is easily computable, i. e.:

Estimate of $130,000.00 Per Year
Salary If No Reduction of Income $2,500.00

Income Received	Like-Proportion of Salary Payable
1932—$41,699.13	$ 825.00
1933— 34,854.63	673.00
1934— 25,083.29	410.00
1935— 12,576.67 to and inc. August	242.00
1936— Nothing after August, 1935	0.00
Total allowable salary	$2,150.00

It is clear from Exhibits A, B and C that the parties anticipated an income of not less than $60,000.00 a year for otherwse the disbursements therein required to be made could not have been paid. Also Cummings received the first year $41,699.13. Although this is far less than what was obviously estimated to be the annual income, using $42,000.00 as the basis the salary would be as follows:

1932—	$41,699.13	$2,500.00
1933—	34,854.63	2,084.00
1934—	25,083.29	1,488.00
1935 to Aug.	12,576.67	750.00
1936—Nothing		0.00
Total allowable salary		$6,822.00

The court below chose to take no notice of this agreement of the parties and allowed respondent the full sum of $11,250.00, together with interest thereon of $4,237.50, making a total of $15,487.50.

The court attempts to justify its action by saying that the claim of Leo J. Falk, Cummings' agent in Idaho, who was to receive the same compensation as Cummings under

Exhibit C, for $11,250.00 was allowed in full. This is incorrect. Exhibit 19, a copy of Falk's claim, shows on its face that it was only partially allowed by the Executor and Probate Judge for the sum of $8,426.00, including all interest thereon. This contrasts with the allowance by the court to respondent for $15,487.50.

The Circuit Court also mentions that there is competent evidence that McDonald had personally agreed to pay this compensation. However, a close scrutiny of all the evidence discloses that Exhibit C is the only evidence concerning this salary. There is no evidence that McDonald agreed to pay it personally, or from which such an agreement can be inferred.

This obvious error should be corrected by this court, and respondent should be limited by the agreement which he made.

It Was Error for the Court to Allow Recovery for the Trustee Items Against McDonald's Estate

By the instrument Exhibit B to the complaint McDonald designated Cummings as trustee and established the trust estate which he was to administer. This estate consisted solely of "the amount *received* as surplus income over and above the amount necessary to pay debts secured by assignments". As such trustee Cummings incurred certain obligations which became and were liabilities of his trust estate. These items are the Cheney note, Hamilton Bank note, loans by Cummings individually to the trust, Peterson's salary, Thrasher's attorney's fee, Cummings' compensation as trustee, and trustees' expenses after McDonald's death.

The Circuit Court permitted individually to recover all of these trustee items from the estate of McDonald, the donor-beneficiary of the trust. Thus, the court establishes as a rule of law that a trustee may borrow money, incur obligations and create trust expenses, and then if such liabilities are in excess of his trust estate he may recover them from the donor of the trust or the beneficiary of the

trust personally. Petitioner submits that this ruling is contrary to the universally established doctrine that a trustee must look solely to the trust estate for reimbursement of his proper and necessary expenditures, that that is his sole recourse for trustee obligations, and that he cannot hold a donor or a beneficiary of a trust personally liable.

The court intimated in its opinion that its reason for ignoring this doctrine was that McDonald was in some way benefited. This reason is unsound because a beneficiary of a trust always benefits from a proper administration thereof by the trustee. If an indirect benefit to a beneficiary is reason for holding him personally liable for trustee obligations, then the contrary rule of no such liability would never have been established nor applied.

The court below also stated that it believed the executor had received $34,166.20, which might have gone to Cummings, trustee, and used to pay such trustee obligations. However, an examination of Exhibit B, the trust instrument, discloses that these monies received by the executor were not trust funds because these trust funds are confined to "the amount received as surplus income over and above the amount necessary to pay debts secured by assignments". Thus, the first requirement for any monies to become impressed with the trust is that they be *received* by Cummings. And it is clear that Cummings never received this sum. However, even if Cummings had received this money it would have been paid to him as attorney-in-fact under Exhibit A, and then by the terms of Exhibit B it would first have to be applied on the debts secured by assignments. Until the debts secured by assignments are paid no monies received by Cummings can become trust funds under Exhibit B. Cummings himself had a debt in excess of $50,000.00 secured by an assignment (Exhibit A), and this sum of $34,166.20 was insufficient to pay off this secured obligation. Consequently, in no way could this money have become trust funds under Exhibit B.

It thus appears that the Circuit Court is attempting to

promulgate the novel doctrine that a trustee may incur obligations in the administration of his trust without regard to the ability of the trust estate to satisfy them, and if it is insufficient may sue his beneficiary or trust donor for recoupment of his losses. This is not the law in Idaho, nor in any other jurisdiction so far as petitioner is aware.

It Was Erroneous for the Court to Allow Recovery of $10,000.00 Attorneys' Fees

Respondent, in his amended complaint, seeks a recovery of attorney's fees, basing such request upon the three promissory notes executed by McDonald. (Ex. 43; T. 44-49). The District Court granted an allowance to Cummings, individually, for attorney's fees of $2,500.00 for legal services rendered Cummings, trustee, and $7,500.00 as counsel fees based on the suit on the notes. The Curcuit Court approved this award.

It may be flatly stated that no allowance may be made in any amount for legal services rendered Cummings, trustee. The claim filed by Cummings (T. 34-44) with the executor makes no mention of any sums due for such legal services, and under the Idaho statutes (I.C.A. 15-604) no action may be maintained against an estate until claim is duly presented. Also, respondent's amended complaint in this action does not seek any amounts for legal services rendered him as trustee, nor does it state any facts upon which an allowance for such services could be based. Consequently, the court committed serious error in granting this recovery to respondent.

It is also clear that respondent should not have been granted $7,500.00, or any amount, as counsel fees based on the suit on the notes. It has always been the settled law of Idaho that attorneys' fees can in no event be recovered in an action unless the evidence establishes:

1. That the plaintiff has agreed to pay attorneys' fees either in a fixed amount or "reasonable fees"; and

2. The amount of the attorneys' fees which is reasonable. This rule of law was early adopted in Idaho ,and has been consistently adhered to ever since; the District Court and the Circuit Court were not privileged to flagrantly disregard it.

Broadbent v. Brumback, 2 Ida. 366, 16 Pac. 555, (1888).

Warren v. Stoddard, 6 Ida. 692, 59 Pac. 540, (1899).

Porter v. Title Guaranty Co., 17 Ida. 364, 106 Pac. 299, (1909).

Lewis v. Sutton, 21 Ida. 541, 122 Pac. 411, (1912).

Eagle Rock Corp. v. Idamont Hotel Co., 59 Ida. 413, 85 Pac. (2d) 242, (1938).

Neither Cummings, nor anyone else, testified that he had agreed to pay any attorney's fee, either in a fixed or reasonable amount, and there is not a particle of evidence to that effect in the whole record. So the first requirement of the Idaho law has not been satisfied.

In addition, there is no evidence of any kind as to what amount of attorneys' fees would be reasonable, either for the suit on the notes or for the whole action. There is some testimony as to the amount of a *contingent* fee in the event of a "substantial recovery" (T. 374-379), and even this estimate goes far outside of the suit on the notes and includes many legal services rendered Cummings, individually, and Cummings, Trustee, and even covering a period of time when Cummings himself testified that he had no attorney (T. 165-6, 322). So it appears that the second requirement of the Idaho rule has not been fulfilled.

The Idaho law is clear and unquestioned that counsel fees cannot be allowed where the evidence does not meet the requirements, and the courts are not privileged to disregard these essential and fundamental prerequisites in their discretion. This does not involve a question of the adequacy of evidence. There is simply no evidence of any kind or character which satisfies or attempts to satisfy the Idaho rule.

CONCLUSION

It is respectfully submitted that the writ should be granted.

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SAM S. GRIFFIN,
WILLIAM H. LANGROISE,
W. E. SULLIVAN,
Counsel for Petitioner.

APPENDIX

The following are pertinent provisions of the Idaho laws, being Idaho Code Annotated, 1932, Official Edition:

§5-201. "Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute."

§5-214. "The periods prescribed for the commencement of actions other than for the recovery of read property are as follows."

§5-216. "An action upon any contract, obligation or liability founded upon an instrument in writing."

§5-217. "Within four years: An action upon a contract, obligation or liability not founded upon an instrument of writing."

§5-228. "An action is commenced within the meaning of the chapter when the complaint is filed."

§5-231. "* * * If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

§5-234. "When the commencement of an action is stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

§15-601. "Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them with the necessary vouchers, to the executor or administrator, at the place of his residence or business to be

specified in the notice. Such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks. The court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation: provided, that when no newspaper is published in the county, the notice shall be posted in not less than three public places in the county, one of which shall be at the courthouse door, for such time, not less than four weeks, as the court may order."

§15-602. "The time expressed in the notice must be six months after its first publication."

§15-604. "All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever: provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or a judge there, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree of distribution is entered."

§15-605. "Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. * * * * *"

§15-607. "When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator he must, within sixty days after its receipt, indorse thereon, his allowance or rejection, with the day and date thereof. If he allows the claim, he must within the same time present it to the probate

judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor, administrator, or judge reject the claim, or disallow any part thereof, he shall within ten days thereafter notify the claimant, his agent or attorney, by mail or personal notice of such rejection or disallowance. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time."

§15-608. "Every claim allowed by the executor or administrator and approved by the probate judge, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim is founded on a bond, bill, note or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited if demanded, unless it is lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. • • • •"

§15-609. "When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after notice of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is forever barred."

§15-611. "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto,

whether homestead, community or separate property of the deceased, where all recourse against any other property of the estate is expressly waived in the complaint."

§15-738. "When any sale is made by an executor or administrator pursuant to the provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed is effected by the statute of limitations, pending the proceedings for the settlement of the estate. * * * * * * *"

No. 1007

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1941

WILLIAM H. LANGROISE, as Executor of the Will of James McDonald, Jr., *Petitioner*,

vs.

WILL CUMMINGS, Individually, and WILL CUMMINGS, as Trustee, *Respondent*.

Respondent's Brief in Opposition to Petition for Certiorari

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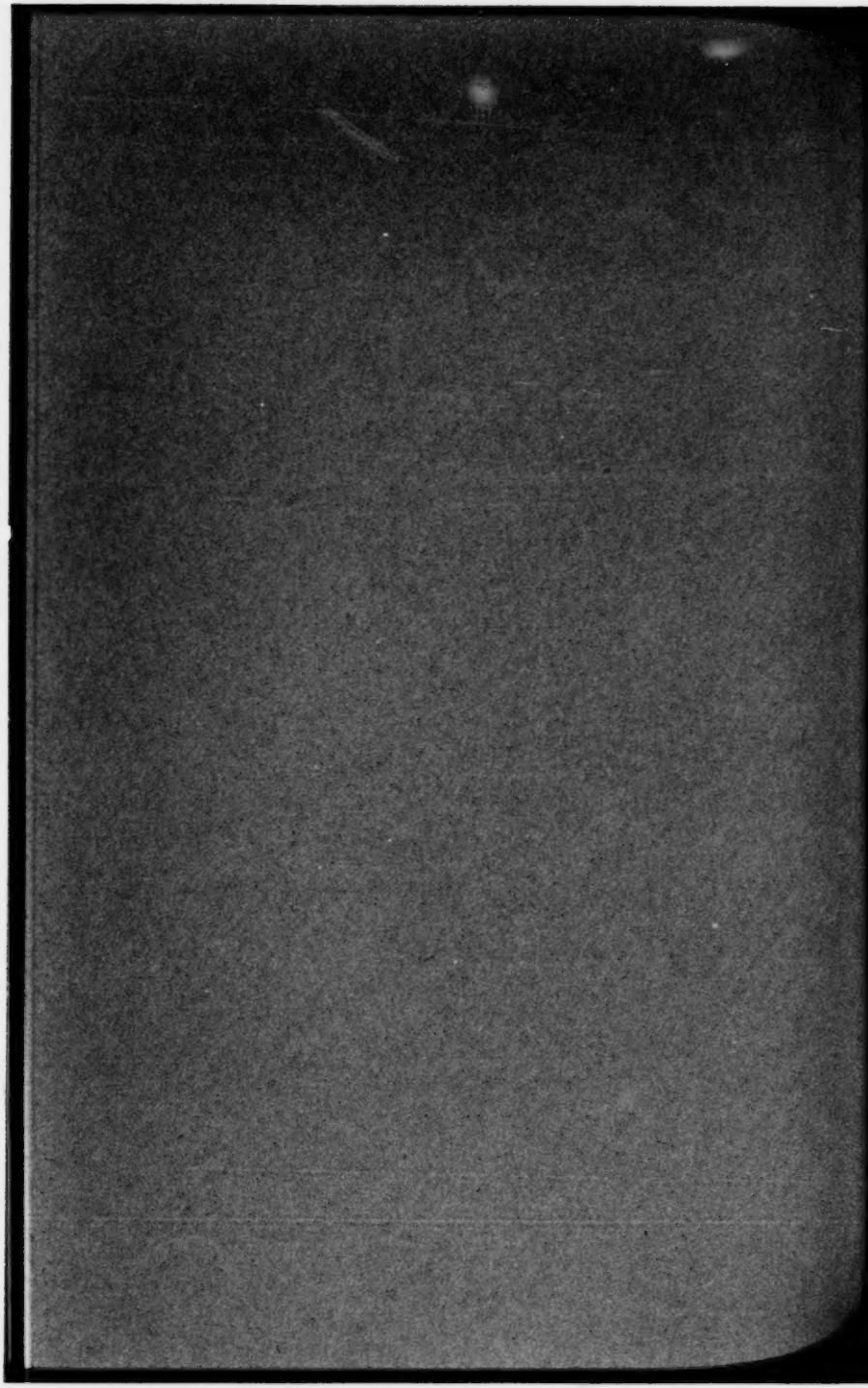

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Respondent respectfully submits that the petition for a writ of certiorari should not be granted, because:

(a) The petition does not present questions of such importance as to justify the granting of the writ;

(b) The Circuit Court of Appeals did not decide any question of local law in a way probably in conflict with applicable local statutes or local decisions.

Both the District Court and the Court of Appeals agreed on the facts and followed the decisions of the Idaho Supreme Court in their application of the statutes involved, which seem too clear to require construction. The District Judge had been a member of the Idaho Bar

for about forty-five years and Judge William Healy, who wrote the opinion for the Circuit Court of Appeals, had been a member of the Idaho Bar for approximately thirty-three years. They are both thoroughly familiar with Idaho statutes and Idaho practice and procedure.

STATEMENT OF FACTS

Petitioner's statement of facts needs clarification. The printed record is also confusing in that Paragraph XII of the original complaint was omitted in the printing and the amended paragraph is set out on pages 60 to 73 of the record. The complaint, therefore, as amended, will be found on pages 1 to 80, and it includes a few exhibits that were printed in whole or in part, but other important exhibits, whether attached to the complaint or introduced in evidence, considered by both the Trial Court and the Circuit Court of Appeals, are not included in the printed record.

The complaint sets forth at some length a history and statement of the transactions which formed the basis of respondent's claim.

The evidence was unusually full and complete and sustained the facts as pleaded in the complaint, and the Trial Court found the facts as alleged (T. 119-142). In brief, the facts are as follows:

The decedent, variously referred to as "James McDonald," "James McDonald, Jr." and simply "Jim," was the son of James McDonald, Sr., who died in January, 1915, leaving a will which disposed of property, which by 1926 had a value of upwards of five million dollars, to James

McDonald, Jr., and the latter's children, with a provision that there could be no distribution of the corpus of the estate until the eldest son of James McDonald, Jr., reached the age of thirty years, which would be about September 10, 1942 (T. 119). Pending such distribution the estate was to be managed by Fulton Trust Company of New York and Lawrence Maxwell of Cincinnati as trustees. Maxwell was later succeeded by Joseph F. Graydon, also of Cincinnati, as co-trustee. Pending the distribution of the corpus James McDonald, Jr., was entitled to receive an annuity of $25,000.00.

The estate of McDonald, Sr., was probated in the District of Columbia. In 1926, in an action brought by James McDonald, Jr. (12 Fed. [2] 822), it was ordered that the trustees should pay to him, in addition to the annuity of $25,000.00, the annual income of his share (one-half) of the testamentary estate, which petitioner states (page 25) amounted to upwards of $130,000.00 per year prior to the depression.

James McDonald, Jr., notwithstanding his large income, became indebted to numerous people in amounts aggregating several hundred thousand dollars (T. 121). Some of the creditors were secured by assignments providing for payment out of the corpus upon termination of the trust in 1943. Other assignments provided for payment out of income and the annuity, and many creditors had no security. In 1931 the unsecured creditors demanded payment; some, including Martin Littleton of New York, who had been the decedent's attorney, obtained judgments and threatened to levy upon and sell the decedent's interest in the testamentary trust.

Sale thereof would have deprived decedent of all income and of all his interest in the testamentary trust. To avoid the approaching catastrophe to his fortune the decedent attempted, in the fall of 1931, to borrow money by assigning as security his interest in the trust and thus provide for an income sufficient for his own living expenses and funds that he could pro rate to the unsecured creditors until payment could be made from the testamentary trust. Because of the depression and uncertainty as to the terms of the trust, he was unable to obtain any loan from banks, loan agencies, and other institutions to whom he and his friends applied for relief.

As a last resort decedent applied for relief to the respondent, Will Cummings, an old friend, of Chattanooga, Tennessee, and the lay judge of the County Court of Hamilton County. Judge Cummings was neither a lawyer nor a money lender, and the Court found that the respondent (T. 122):

> "For the purpose of assisting said James McDonald, Jr., and his family, *and not otherwise*, consented to loan to said James McDonald, Jr., $50,000.00 for immediate use in securing adjustments with his creditors and extensions of time within which to pay the balance; that respondent agreed to make such loan upon the terms and conditions set forth in certain documents, all executed on and dated December 17, 1931, by said James McDonald, Jr." (Here follows a description of the documents.)
>
> "That the said notes and the said contracts were

all executed and delivered at the same time and as part of the same transaction" * * *

The Court found (T. 123) that the decedent assigned to the respondent:

> "All his share and interest in the testamentary trust, including the corpus and principal thereof, income and annuity, not previously transferred or assigned; that such assignment was made as security for the payment of said notes and interest thereon, and for further sums advanced as therein provided, and by said assignment said Will Cummings was authorized and empowered to receive and collect from the testamentary trustees, and they were authorized and directed to pay to said Will Cummings, all moneys which, except for said assignment, would be payable to said James McDonald, Jr., under said testamentary trust."

Both the District Court and the Circuit Court of Appeals found and held that by the various contracts and assignments so made by the decedent Will Cummings was trustee for the unsecured creditors, for himself, and for James McDonald, Jr.; that out of the moneys received he had the right to pay McDonald's indebtedness to respondent as the obligations matured, and he was required to pay $2,000.00 per month to the decedent for his personal use and living expenses, and the balance he was directed to apply pro rata to the payment of creditors.

The testamentary estate consisted largely of stocks of the Standard Oil companies, the dividends from which were substantially reduced during 1932 and thereafter. The decedent failed to pay his Federal income tax, with the result that the Collector of Internal Revenue, in July, 1935, filed a lien for upwards of $30,000.00 on the assets in the hands of the testamentary trustees, who thereupon refused to make any payment either to the respondent or the decedent (T. 130). From the filing of said lien until decedent's death on July 2, 1936, upon the urgent request of petitioner as counsel for decedent and upon the entreaties of decedent, his wife, and friends, respondent advanced to the decedent and his family for necessary living expenses large sums, out of his personal funds, which were secured under Exhibit D (T. 32). Respondent borrowed money as trustee and personally guaranteed the payment thereof in order to make advantageous settlements with creditors who were in need of cash. The Court found that by so doing respondent saved the estate upwards of $48,000.00 (T. 136), but it actually aggregated over $50,000.00. Respondent paid out under his trust upwards of $200,000.00, of which about $125,000.00 was received from the testamentary trustees and the balance was from money loaned to the decedent or the trust by respondent, or money which he borrowed as trustee and for which he was personally liable as endorser or guarantor.

Respondent, in order to better protect the decedent's estate, make advantageous settlements, and prevent creditors from attaching the assets in the testamentary trust, applied practically none of the money which he received

from the testamentary trustees to his own accounts or for the payment of the amount due him from the decedent or to the payment of the salary which it was agreed he should have, but the money was applied to the payment of what the decedent owed to other creditors or paid to the decedent for his living expenses; and the trustee's (respondent's) accounts and reports showing the application of all funds in the respondent's hands as trustee were approved in writing by the decedent (T. 262 and 50, and Exhibits 27 and 28 not in printed record).

Petitioner takes the untenable position that respondent should have applied the money which he received from the testamentary trustees to the payment of the amount due respondent before paying anything to the decedent and other creditors, and having failed to do so he should not now be permitted to recover anything. The simple answer to that is that had he followed that course the decedent would have had no money for living expenses and the other creditors would have attached and sold the assets in the testamentary trust and there would have been no estate for the petitioner to administer upon. Furthermore, decedent repeatedly approved in writing the course followed by respondent. The Circuit Court of Appeals says the course followed by respondent was obviously for McDonald's benefit (T. 454-455).

James McDonald, Jr., died on July 2, 1936. At that time respondent, as trustee, was entitled under his assignments, to all assets held by the testamentary trustees. Up to that time he had drawn no compensation for his services, extending over more than four and a half years. He claimed and was allowed $2,500.00 a year for that

period, or a total of $11,250.00. After the death of James McDonald, Jr., petitioner made a demand on the testamentary trustees for distribution of decedent's share (one-half) of the testamentary trust. The testamentary trustees in September, 1937, commenced an action in the District Court of the United States for the District of Columbia for instructions as to their duties under the trust. That Court held in substance that the death of James McDonald, Jr., terminated the testamentary trust and that a distribution should be made of his share.

Paragraphs 14 to 18, inclusive, of respondent's complaint (T. 12-17) set forth respondent's position as to how petitioner obtained possession of the assets which had been assigned to respondent as security (see also Findings, T. 139). In brief, the facts are that respondent relied upon an agreement with petitioner that sufficient assets, subject to respondent's assignments, were to be retained by the testamentary trustees in the District of Columbia to enable respondent to close up his trust and pay all obligations for which he as trustee was liable, and the indebtedness to himself. In violation of that agreement and unbeknown to respondent, petitioner obtained possession of all assets held by the testamentary trustees for the decedent and they were promptly removed to the State of Idaho. Later, under the pretense of carrying out the agreement, petitioner, as executor of the estate, placed certain corporate stock certificates which had been transferred to petitioner as executor, in a safe deposit box in the Riggs National Bank in the city of Washington (T. 139-140), and thereupon his counsel, Senator D. Worth Clark, notified respondent that unless

he promptly commenced an action in the courts of the District of Columbia to assert his rights to the securities they would again be removed to the State of Idaho (Exhibit 10, not in printed record). Respondent promptly (September, 1939) commenced a suit to impress his lien under his assignments upon the stock certificates which had been transferred to petitioner as executor and deposited as aforesaid, but service of process could not be obtained upon petitioner in the District of Columbia and his counsel moved to dismiss the action for want of jurisdiction, as the assets were then the property of the executor and the latter could not be sued in a foreign jurisdiction without his consent. That action was accordingly dismissed in January, 1940.

Within the time required by law after the death of the decedent and the publication of notice to creditors to file claims, respondent filed his claim with petitioner as executor. The District Court found that the claim was in due form (T. 146) and the Court of Appeals said:

> "On appeal the executor does not appear to argue this point, contenting himself with certain objections of a highly technical nature directed toward some of the trustee items." (T. 456.)

Under the statute (Sec. 15-607, I.C.A.), it was the duty of petitioner to either approve or reject the claim within sixty days after it was filed, but petitioner held the claim for approximately two years and eight months (February 21, 1937, to November 10, 1939), or until it was obvious that the Court for the District of Columbia

had no jurisdiction, in view of petitioner's objection, of respondent's suit to recover the securities, and petitioner then rejected the claim in toto without explanation.

Within the time required by law respondent commenced his action in Idaho, not only to recover on the items embraced in the claim so filed and rejected, but to enforce his right to the securities, the possession of which had been wrongfully obtained by petitioner but were still subject to respondent's trust under the assignments.

The District Court held that petitioner took the securities from the testamentary trustees with notice and knowledge of respondent's assignment thereof and lien thereon, but contrary to our contention the Court held that respondent had a lien for only $77,150.16, plus interest thereon, and that the remaining $12,630.98 of respondent's claim, plus interest thereon, was not secured but was a claim against the estate, to be paid in due course of administration (T. 147-148). Apparently the Circuit Court of Appeals was of the opinion that respondent should have been decreed a lien for all items in his claim, for the opinion of that Court says (T. 455):

> "We believe the relief granted by the Trial Court was not as full as that to which Cummings was entitled; but of this the executor is in no position to complain. Under the circumstances there was no reversible error in decreeing that the trustee items be paid in due course of the administration of the estate, nor in adjudging part of these items to be lienable."

Respondent, as trustee under the assignments made by the decedent, has been put to much expense for attorneys' fees and otherwise, and he has been deprived of the right to close his trust and pay the obligations which he had incurred and was required to pay as trustee. Petitioner's contention as to whether certain items were proper charges against the estate, whether they were included in the account filed with the executor, etc., are of no practical importance. Such contentions are but quibbles over technicalities, for the items were secured by all assets which petitioner received from the testamentary trustees.

The estate is large and the securities subject to respondent's lien and trust are ample for the payment of respondent's judgment. As trustee he is entitled to compensation for his services, which were most valuable to the decedent, and to payment for the obligations he has incurred for counsel fees, and it is of little moment whether the attorney's fees are recovered under the provisions in the notes for the payment of such fees or are recovered under the general law of trusts and trustees.

ARGUMENT

No Controversy Over the Facts

The findings of the District Court cover every issue of fact. The findings were sustained by the Circuit Court of Appeals and they are sustained by the uncontradicted evidence. Much of the evidence consisted of exhibits not printed in the record but certified by the District Court to the Court of Appeals for use on appeal. By order of

that Court made June 20, 1941, and a certified copy of which is on file with the Clerk of this Court, it was ordered:

> "That counsel for the respective parties may, in their briefs, refer to and quote from any of the exhibits in this cause on file with the clerk of this Court which they may deem pertinent to the issues on appeal, notwithstanding such exhibits have not been printed as part of the record."

In view of the condition of the record filed in this Court with the application for the writ of certiorari we shall assume that this Court will follow the customary rule that the petitioner's contention that certain items are not sustained by the evidence *can not overcome the weight of the findings of two Courts.*

Texas & P. R. Co. vs. Railroad Commission, 232 U.S. 338, 58 L. Ed. 630.

Brewer-Elliott Oil and Gas Co. vs. United States, 260 U.S. 77, 86; 67 L. Ed. 140, 145.

Washington Securities Co. vs. United States, 234 U.S. 76, 58 L. Ed. 1220, 1222.

The Statute of Limitations

Petitioner's argument rests on strained technicalities in applying to the facts of the case the provisions of the statutes, contracts, and the law as to the duties and powers of respondent as trustee under decedent's contracts of December 17, 1931 (Exhibits A, T. 21; B, T. 26; D, T. 32; F, T. 57).

Petitioner avoids any discussion of the merits of respondent's claim and of the equities in his favor. He makes the novel contention that the statute of limitations ran against respondent's claim while it was on file with the executor (petitioner) and presumably being examined and investigated preliminary to rendering a decision on the allowance thereof.

Petitioner concedes that not a single item in respondent's claim was barred by the statute of limitations when James McDonald, Jr., died on July 2, 1936, or when the claim was filed with petitioner in February, 1937. Petitioner held the claim until November 10, 1939—over two years and eight months—presumably for the purpose of considering the correctness of the items and the liability of the estate for the payment thereof. He sought no information about the claim from anyone and finally rejected it without explanation.

Section 15-607, I.C.A., provides:

> "When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator he must, within sixty days after its receipt, endorse thereon his allowance or rejection, with the day and date thereof * * *. If the claim is presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time."

Section 15-611, I.C.A., provides:

> *"No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator,"* (our italics)

and Section 15-609 provides:

> "When a claim is rejected * * * the holder must bring suit in the proper Court against the executor or administrator, within three months after notice of its rejection."

The petitioner, acting upon the strange theory—without support from either Idaho statutes or court decisions—that the statute of limitations would run against the claim while he held it under advisement, apparently assumed that he had held it *long enough to bar all items,* for he rejected the claim in its entirety, although he conceded in his brief in the Circuit Court of Appeals that items to the amount of $3,250.00 had not been barred, and that the respondent should have judgment therefor with interest, and in his petition in this Court for the writ of certiorari he concedes (page 13) that items in the principal sum of $4,962.50 had not been barred and should have been allowed.

Petitioner's contention that the courts below have decided an important question of local law in a way probably conflicting with applicable local decisions is so wholly unfounded as to challenge attention to the purpose or motive that prompts such contention. Petitioner and his counsel surely know that the theory they now advance would upset the construction that the Idaho Bar and the Idaho Courts have from the very beginning

of our territorial government placed on the applicable statutes.

The rule heretofore accepted and followed in Idaho is in substance to the effect that the general statute of limitations is suspended upon the death of the debtor, and that from thence on the filing of claims and the collection thereof from the estate of the deceased is controlled by the probate law and statutes of nonclaim, and not by the general statute of limitations.

The district judge who tried this case had been a member of the Idaho Bar for upwards of forty-five years and Judge William Healy, who wrote the opinion for the Circuit Court of Appeals, had been a member of the Idaho Bar for approximately thirty-three years. But this Court does not even need to apply here the rule on which it decided the case of MacGregor vs. State Mutual Life Insurance Company, February 16, 1942. There were no court decisions in Michigan construing the statute there involved, and this Court said:

> "in the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan Federal Judge of long experience and by three Circuit Judges whose circuit includes Michigan."

In the State of Idaho the highest court of the state passed directly on the question in the case of Wormward vs. Brown, 50 Idaho 125, 294 Pac. 331. The Court points out certain changes that had been made in the Idaho Probate statutes by an amendment in 1929 which

materially affected the procedure. At one time the statute provided that if the executor or administrator, or probate judge refused or neglected for *ten days* after the claim had been presented to him to endorse his allowance or rejection on the claim *"such refusal or neglect is equivalent to a rejection."* The words quoted were eliminated from the statute and the period of ten days was extended to sixty days and since 1929 the statute has read as set out in Section 15-607, supra.

In Wormward vs. Brown the complaint alleged that the claim had been filed but that "no action was ever taken by said defendant thereon either by way of allowance or rejection and that the time for action thereon had expired." The Court sustained a demurrer to the complaint. An examination of the official record in the office of the Clerk of the Supreme Court shows the following facts: The debtor died on January 14, 1929. The executrix was appointed with reasonable promptness. Notice to creditors was published on March 22, 1929, and the claim filed with the executrix on July 12, 1929. The *executrix having taken no action on the claim,* the claimant filed his action against the executrix for the collection of his claim on December 14, 1929—*144 days* after the claim had been filed. Upon the facts as disclosed by the record the Court sustained the demurrer and the Supreme Court in affirming the judgment said:

> "The only question remaining in this case is whether the claim must be filed and *rejected before suit can be maintained,* and if so, whether the *failure of the executrix to allow or reject the claim* as set forth

in the complaint, *amounts to a rejection*, authorizing suit on the claim as a rejected claim. In Flynn vs. Driscoll, 38 Ida. 545, 34 A.L.R. 352, 223 Pac. 524, this Court said:

"'Supporting the view that an action can not be maintained upon a claim against an estate until it has been first presented to the executor or administrator substantially in the manner prescribed by the statute, and rejected, and hence such suit' (the suit itself) 'can not be sufficient presentation, see also the following: Burke vs. Unger, 88 Okla. 226, 212 Pac. 993; First Security & Loan Co. vs. Englehart, 107 Wash. 86, 181 Pac. 13; Dakota Nat. Bank vs. Kleinschmidt, 33 S.D. 132, 144 N.W. 934; Printz-Biederman Co. vs. Torgeson, 41 S.D. 48, 168 N.W. 796; Dillabough vs. Brady, 115 Wash. 76, 195 Pac. 627.'

"The statement of the Court in Flynn vs. Driscoll, supra, is broader than the decision rendered in that case required, but *we are convinced the statement of the law is correct, and hold that at the time the claim in question was filed, which was on the twelfth day of July, 1929, the law contemplated before an action might be maintained upon such a claim against the estate of a deceased person, the claim must have been filed and disallowed, as provided by the statute*, and such action brought within three months after such disallowance, and *that mere failure to act on the part of the executor or administrator upon a filed claim within the time* (60 days) prescribed by C.S., Sec. 7584 as amended, *does not amount to a disallowance of the claim*. It follows the District Court was right in

sustaining the demurrer in this case because it does not appear from the complaint that the claim had been disallowed." (Our italics.)

The Court specifically and unqualifiedly held that the complaint did not state a cause of action because it failed to allege that the executrix had *rejected* the claim, although she had held it 84 days longer than the statutory time. In other words, *the probate code is an express statutory prohibition against the commencement of any action on a claim until it has been rejected by the personal representative of the estate.* The Court not only so held in Wormward vs. Brown, but it referred to the prior decision in Flynn vs. Driscoll as sustaining the same construction of the statute.

The rule is basic and general that the statute of limitations is tolled when one is prohibited by statute from bringing an action on his claim.

Heckman vs. Kassing, 76 Ind. App. 401, 132 N.E. 379.
Jordan vs. Jordan, Dudley 182.
Blaskower vs. Steele, 23 Ore. 106, 31 Pac. 253.
In re Anderson, 200 Minn. 470, 274 N.W. 621.
In re Smith, 218 Wis. 640, 261 N.W. 730.

Petitioner refers to Sec. 5-231, I.C.A., which provides that:

"If a person against whom an action may be brought dies before the expiration of the time lim-

ited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

This section was adopted in Idaho by the first territorial legislative session, 1864. It was taken from the California Code, but at the time of its adoption in Idaho this statute had not been construed in California as applying to *money claims* filed against the estates of deceased persons, but, on the contrary, such claims were not considered as coming within the application of this act. That was the decision of the California Supreme Court in Smith vs. Hall, 19 Cal. 85, and Quivey vs. Hall, 19 Cal. 97, and it has never been construed in Idaho as applying to money claims against the estate. At the time of the adoption of the above section there was in the Probate Code a provision in substance to the effect that if the executor or administrator refuses or neglects to endorse his allowance or rejection on the claim for *ten days* after the claim has been presented to him *"such refusal or neglect is equivalent to rejection."* Under that statute a claimant could file his claim and if it were not allowed or rejected within ten days he could bring his action, for there was then no statutory prohibition against such action. That provision of the statute was *eliminated by amendment* and after the statute had been amended the Idaho Supreme Court rendered its decision in Wormward vs. Brown, 50 Idaho 125, 294 Pac. 331, to the

effect that a creditor could bring no action on his claim until it had been *rejected* by the executor or administrator. Under the old statute it could perhaps have been argued that Section 5-231 gave a creditor ample time to file his claim and bring suit within the year after the issuance of letters of administration. Under the present statute, if Section 5-231 has any application it must be limited to other kinds of relief against an estate than claims for payment of money.

Petitioner cites the case of Miller vs. Lewiston National Bank, 18 Idaho 124, 108 Pac. 901. That decision was rendered under the old probate law and long before the amendment of 1929, but even in that case the Court holds directly contrary to petitioner's contention. On page 144 of the Idaho Reports the Court says:

> *"We are unable to find any statutory authority for the contention of the appellant that it was the duty of the respondents to have their claims either allowed or rejected and suit brought thereon within one year from the date of the issuing of the letters of administration. That is not what is meant by the provisions of Sec. 4071 supra* (now Section 5-231)." (Our italics.)

The District Court and the Court of Appeals followed the decisions of the Idaho Supreme Court in Wormward vs. Brown and Miller vs. Lewiston and what has been the uniform and established practice in the State of Idaho from the time of the adoption of the first territorial code.

When Did Respondent's Cause of Action Accrue in Idaho?

We should, perhaps, call attention to the fact that petitioner assumes that respondent as trustee could have brought suit in Idaho against the decedent upon default in payment of the several notes and claims as they respectively became due. The assumption is erroneous. The obligations were *secured* by collateral held by the Fulton Trust Company in the City of New York. Under the laws of Idaho one can not sue the debtor on a secured obligation and obtain judgment without first exhausting the security. Hence, as long as the security was held in New York no action either against the debtor or for the foreclosure on the security could be brought in Idaho. Judgment against the debtor, on a secured claim, can be only for the deficiency remaining after the sale of the collateral.

First National Bank vs. Williams, 2 Idaho 670, 23 Pac. 552.

Berry vs. Scott, 43 Idaho 789, 255 Pac. 305.

The assets securing respondent's claim were not brought to Idaho until October, 1938 (T. 138) and the Idaho statute of limitations commenced to run at that time, if at all. Respondent's suit was commenced February 6, 1940 (T. 60).

Petitioner also assumes that when respondent made advances to decedent for his living expenses, as set out in the findings of the Court (T. 130-133), he had the right to immediately bring suit for the repayment of such advances. The advances were secured by the assets in

the testamentary estate under agreement dated November ...., 1935 (Exhibit D, T. 32), and there was, of course, the implied understanding that the advances could be paid only out of the trust estate held in New York and assigned to respondent as security. The decedent had no other means of repaying such advances and they were made with that understanding. He assigned as security the only assets he had and all parties assumed the testamentary trustees would some day resume payment of dividends or deliver decedent's share in the estate. It would be absurd to assume that the decedent and respondent contemplated that the latter, when making a payment to the decedent for living expenses, could immediately serve him with process in an action to recover it. The facts do not justify such construction of the agreement for advances.

The Statute of Limitations Was Waived by Acknowledgments in Writing

Under the laws of Idaho the statute of limitations may be waived by an acknowledgment, in writing, of the existence of the debt. The acknowledgment raises an implied promise to pay as said by the Idaho Supreme Court in Dern vs. Olsen, 18 Idaho 358, 110 Pac.. 164:

> "The acknowledgment of an existing indebtedness, in the absence of a specific refusal to ever pay the debt, necessarily carries with it the implied promise to pay it at some time in the future." (Page 366, 18 Idaho Rep.).

Again the Court says (page 367):

> "An acknowledgment in writing of the existence of such a contract is the acknowledgment of a 'continuing contract' within the meaning of this statute, and simply fixes a new date from which the statute of limitations begins to run. It in no respect changes, alters or modifies the original contract; it is simply a waiver of that portion of the statute of limitations which may have run prior to the 'acknowledgment'."

The agreement prepared by petitioner as counsel for McDonald, dated November ...., 1935 (Exhibit D, T. 32) refers to the assignments of 1931 to pay decedents indebtness to respondent and provides that advances made for living expenses shall be secured under the said assignments of decedent's share in the testamentary estate.

Will Cummings as trustee rendered two full and complete accounts. Both were approved in writing by James McDonald. The first account, dated June 18, 1932 (Exhibit No. 27, not in printed record), contains a full and complete itemized statement of receipts and disbursements, showing moneys borrowed, obligations incurred, and obligations paid from December 17, 1931, to and including June 17, 1932. On each page of that account James McDonald recorded his approval. Above his signature there is the following statement:

> "The claims above shown and payments thereon are hereby approved."

McDonald particularly enumerated and approved cer-

tain obligations incurred by respondent (T. 262) and they are obviously binding on decedent's estate and secured under the assignments.

The second report made by Will Cummings, Trustee (Plaintiff's Exhibit No. 28), covers the entire period from December 17, 1931, to August 21, 1935, and hence includes again the items that were included in the first report. The second report was approved by James McDonald on January 18, 1936, in the following language:

> "I hereby approve the settlement rendered by my trustee, Judge Will Cummings, of Chattanooga, Tennessee, on the ——— day of August, 1935, in which he sets out receipts and disbursements made by him under the assignment and power of attorney from me.
>
> "This 18th day of January, 1936.
>
> (Signed) "JAMES MCDONALD."

This approval is set out in the printed record (Exhibit 12, T. 50) and some excerpts from that report were printed in the record. The trustee's second report was Exhibit 13 to respondent's claim as filed with the executor (T. 51).

Respondent's Claim as Filed with Executor Was Sufficient Both as to Contents and Form

Respondent's claim as filed with the executor contained all the information and data required by the Idaho statutes either in the claim itself or by reference. Petitioner contends that respondent did not file with his claim the contracts of assignment (Exhibits A, B, C, and D attached

to the complaint) (T. 21-34, 57-60). The claim was unusually full and complete (T. 34-57). But only a skeleton of the claim is printed in the record. The full claim was introduced as an exhibit and has not been certified to this Court with the record. The claim *was founded upon the promissory notes, checks, and vouchers* showing advances and payments to the decedent. The notes themselves were set out in the claim and *they specifically and at length state that they are secured by and that they are an assignment of both the corpus and income of McDonald's entire share in the testamentary estate* (T. 45-49). In the claim respondent refers to the documents assigning to him as trustee the testamentary trust as security for his claim, and adds (T. 36):

> *"Claimant refers to these documents for their contents, copy of which are now in the hands of the executor of this estate."*

Further over in the claim (T. 42) the respondent further stated:

> "Copies of all of said agreements are now in the hands of the executor * * * *and if any other, or further, data is desired claimant will be glad to furnish same."* (Our italics.)

It was admitted on the trial that petitioner had copies of all agreements covering respondent's trusteeship and assignments to him of decedent's interest in the testamentary estate, but petitioner claimed that he had re-

ceived them and held them as *counsel* for McDonald and not as executor of his estate. We think petitioner's contention is too technical to require further answer and that was the conclusion of the courts below. Besides, those courts concluded that the claim against the estate was not founded upon the separate agreements and assignments but upon the notes, checks and vouchers showing the moneys advanced to decedent or for his account and his obligation to repay. It was also admitted that petitioner never availed himself of respondent's offer, repeated in his claim as filed, to furnish additional proof or evidence in support of his claim. Petitioner never required any further evidence or proof or any explanation of the claim, but denied it without any suggestion as to his reasons therefor.

Trustee's Fees

That respondent is entitled to compensation for the services rendered as trustee would seem to be elementary. The Trial Court, having seen and heard the witnesses and read the numerous exhibits which are not in the printed record, said in its findings of fact (T. 136) regarding respondent's claim for compensation:

> "He is entitled to compensation for his services; he performed his duties with loyalty and faithfulness to the decedent and, by advancing his personal funds and obligating himself for money borrowed, he was able to effect settlements with creditors of said James McDonald, Jr., that saved the estate upwards of $48,000.00."

The savings actually aggregated over $50,000.00. He served as trustee for four and one-half years prior to the death of McDonald and he has since been compelled to carry on expensive litigation in order to wind up his trust and obtain the trust assets so he can pay the obligations incurred and secured thereby. He claimed and was allowed the modest charge of $11,250.00. Both courts found there was ample evidence to sustain his right to that compensation. Petitioner's contention that his compensation should be scaled down because of the reduction in the income of the testamentary estate is without merit. The refusal of the testamentary trustees to continue the payment was due to the decedent's failure to pay his income tax. That was no fault of respondent, but it greatly increased his burdens and duties, and he should not suffer for the defaults of the decedent.

The evidence was clear that no estimate was made when the contracts of December 17, 1931, were entered into as to what the income would be in view of the depression which then was spreading over all industries and seriously affecting the income from all securities.

In all fairness and under the law of trusteeships the respondent should have had reasonable compensation from the period since McDonald's death until the trust can be closed; then and not until then should the remaining assets of the testamentary trust be turned over to the executor for administration under the will.

Attorney's Fees

The petitioner, by taking possession of the trust estate in direct violation of the rights of respondent under his

assignments, forced respondent into long and expensive litigation to protect his trust and to recover the funds necessary to close his trusteeship in an orderly manner so he could pay the obligations that he had incurred as trustee and the obligations that were secured by the trust estate. It is immaterial whether the modest fee of $10,000.00 allowed by the Trial Court be based upon the general law of trusts and trustees and the right of the trustee to employ counsel or upon the provisions in the notes that (T. 49):

> "Upon default in payment of this note, maker and endorser agree to pay all costs of collection, including reasonable attorney's fee, for all services rendered by suit or otherwise, in collecting or attempting to collect this note, or any security for its payment or in any effort to further secure the same."

Two courts have found that there was ample proof to sustain the fees allowed. There are certain presumptions that may be indulged on the basis of human experience and the experience of members of the bar and members of the judiciary. Respondent appeared at the trial and testified at length under examination of his counsel. We think the Court may assume that counsel that appeared for him had been employed to represent him and that he had agreed to pay them reasonable compensation for their services. As said by the Supreme Court of Wyoming in Farmers State Bank vs. Haun, 30 Wyo. 322, 222 Pac. 45, 50:

"We do not think it was necessary to introduce evidence showing the employment of counsel by respondent bank, or that a reasonable attorney fee was to be paid to them. Counsel for respondent are officers of the Court and presumably appeared in Court as counsel representing their clients, and presumably their appearance and the services rendered by them were with full authority to do so, either under an express or implied promise to receive reasonable compensation for such services."

The Federal Court may exercise independent judgment on the presumptions that followed from the appearance of attorneys admitted to practice before their Court and as to evidence touching their compensation. Such matters are not controlled by the practice in the local courts.

"Generally in the United States attorneys at law who are employed to render services without agreement as to fee are entitled to recover reasonable compensation, a promise to pay such being implied by law."

Kline vs. Blackwell (C.C.A. 5), 63 Fed. 2d 897, 899.

Wood, on Fee Contracts of Lawyers, Sec. 18, p. 47.

Presumptions and order of proof are matters of procedure and are not governed by what petitioner claims is the unwritten practice in local courts. The conclusions of the courts below, who are obviously familiar with the law

and practice in the state courts are also conclusive on this point.

WHEREFORE we respectfully submit that petitioner has not shown any grounds or reason why the writ of certiorari should be granted.

Respectfully submitted,

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